Supreme Court, U.S.
FILED
JAN 20 1983
Alexander L. Stevas, Clerk

82-1246

NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an em-

ployee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

4. Whether an appellate court can overturn a judgment for a plaintiff under the *New York Times Co. v. Sullivan* standard on the basis of testimony about editorial review which the trial judge, sitting as finder of fact, had found to be "wholly untrustworthy and ... not credible".

5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Bose Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 2, 1982.

Citations to Opinions Below

The opinion of the United States District Court for the District of Massachusetts on liability (A3-30)[1], App. X37-167, is reported in 508 F.Supp. 1249, 7 Media L. Rep. (BNA) 1069, and on damages (A31-37), App. X168-200, in 529 F.Supp. 357, 7 Media L. Rep. (BNA) 2481. The opinion of the Court of Appeals, App. X1-X36, is reported in 692 F.2d 189, 8 MEDIA L.REP. (BNA) 2391.

The opinion of the District Court denying respondent's motion for summary judgment is reported in 84 F.R.D. 682, 210 U.S.P.Q. (BNA) 645, 5 Media L. Rep. (BNA) 2404, in denying respondent's motion to dismiss in 181 U.S.P.Q. (BNA) 543, in certifying a question of state law to the Massachusetts Supreme Judicial Court

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[1] Reference to the appendix in the court below is to "A" page numbers. Reference to the separate appendix herein containing the lower court opinions is to "App." followed by "X" page numbers.

in 19 Fed. R. Serv. 2D (Callaghan) 442, and in requiring petitioner to plead special damages in 16 Fed. R. Serv. 2d (Callaghan) 1090. The opinion of the Massachusetts Supreme Judicial Court ruling that the filing of the complaint did not toll the statute of limitations for respondent's counterclaims is reported in 367 Mass. 424, 326 N.E.2d 8.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1982. A timely petition for rehearing suggesting rehearing *en banc* was denied on November 23, 1982, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of

FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an

employee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

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5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual

malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

Constitutional Provisions Involved

Congress shall make no law ... abridging the freedom of speech, or of the press ... . U.S. Const. Amend. I.

No person shall ... be deprived of ... property, without due process of law ... . U.S. Const. Amend. V.

Federal Rule of Civil Procedure Involved

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court

adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement

In the May 1970 issue of respondent's monthly magazine, *Consumer Reports*, respondent reported on a series of tests and measurements conducted by its engineers in an article entitled "Loudspeakers" (the Article). In addition to an evaluation of the quality and performance of 24 loudspeakers, represented as based on objective tests and measurements conducted by respondent's engineers, the Article reported on tests of petitioner's more expensive 901 loudspeaker system in a boxed-off section picturing the 901 system (A4-6). App. X46-50. Prior to publication of the Article, the Bose 901 system had received the best

reviews which ever had been given to a loudspeaker product (A364). App. X196.

After attempts to obtain a retraction failed, petitioner commenced this action to obtain relief for the harm caused by respondent's false and disparaging report on the Bose 901 system. Jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332(a)(1) on the Lanham Act, 15 U.S.C. § 1121 and 28 U.S.C. § 1338(a) and (b) (A3). App. X38-39.

After 19 days of trial during February, March and April 1980 before Senior District Judge Julian without a jury, the District Court found that petitioner had proved, by clear and convincing evidence, that respondent published a false statement of fact disparaging the Bose 901 system with knowledge that the statement was false or with reckless disregard for the falsity, holding respondent liable for product dis-

paragement as alleged in Count III of the complaint. The District Court ruled that petitioner did not sustain its burden of proof on Counts I and II of the complaint, based on common law tort liability and violation of section 43(a) of the Lanham Act, respectively (A30). App. X143-45. After two and a half days of trial on damages before Chief Judge Caffrey without a jury in June 1981, the District Court entered judgment for the plaintiff on February 8, 1982, for $210,905.64 in damages, interest and costs (A38). App. X1, X200.

The District Court found a number of representations made by respondent in the Article to be false or misleading but not damaging to petitioner (A13, A15), App. X70-71, X76-77, found a statement of opinion not actionable (A15), App. X80, and found that petitioner had not sustained its burden of proof with respect to other

statements (A17, A20) App. X85, X99.

The District Court found the statement in the Article, "Worse, individual instruments heard through the *Bose* system [by a "panel" of two engineers including the author of the statement] ... tended to wander about the room," to be a false and disparaging statement of fact which was damaging to petitioner (A21). App. X103-06.

Respondent's project engineer Seligson, who was in charge of the tests, wrote the original draft of the statement (A21), App. X103, and repeatedly checked the statement for accuracy before publication in the Article (A147). App. X32-33. The District Court said, "The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that 'tended to wander about the room.'" (A29 n.44) App. X168.

Both "panelists," Seligson and another engineer, Lefkow, who worked under Seligson, testified that the wandering sounds they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed (A20). App. X100. The District Court said, "Because such movement between two loudspeakers is a common effect [with all stereo loudspeaker systems] and is to be expected, a reader would not be surprised to read about 'instruments' moving along the wall between two loudspeakers." (A20) App. X101.

The two "panelists" allegedly made the tests on which the false statement was based on January 23, 1970, about three months before the Article was published, and recorded them on a little over a page in a laboratory notebook (PX9, Tr. 84,85[2],

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[2] We refer to petitioner's exhibits as PX and the trial transcript as Tr. followed by the pages where identified and offered, respectively.

A482-83). This laboratory notebook record fails to mention any moving instruments other than a violin or describe any comparative tests playing the same recordings through other speakers to determine whether the cause of the violin movement was the unidentified recording instead of the Bose 901 loudspeakers (A482-83).

"Panelist" Seligson testified that they tested three loudspeakers (A114, A116, A119), but "panelist" Lefkow testified that they tested only the Bose 901 system during this "special listening test." (A240-41, A253).

The District Court found that respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute that false claim by making demonstrations using the same recordings." (A36) App.

X194-95.

In a memorandum of respondent dated June 4, 1970 (PX33, A208, A224), of a meeting the day before with two representatives of petitioner, the following appears relative to the false and disparaging statement.

> ...Bose took extremely strong exception to the concept of wandering, and expressed the view that on theoretical grounds such an observation was patently impossible. There was some discussion on the philosophical considerations of subjective observations made that run counter to theoretical considerations. (After the meeting, WS [Walker Sandbach, then respondent's executive director] reported to MF [Monte Florman, respondent's technical director and the author of the memorandum] that CEW [Colston E. Warne, then respondent's president] felt that we were, in his opinion, weakest in our arguments about the wandering instruments. ...) (A487-88, A208-11).

The District Court found:

> Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers, testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wan-

dering instruments and the statement about gigantic power required." Tr. 2-144. Thus, the false statement that "individual instruments heard through the *Bose* system ... tended to wander about the room" cannot be considered a *de minimis* violation of the plaintiff's rights. (A21-22) App. X106-07.

After finding the statement false and disparaging, the District Court ruled that the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied to product disparagement cases, and that petitioner was a "public figure." The District Court therefore required petitioner to show with clear and convincing proof that respondent had published the false disparaging statement with the knowledge that it was false or with reckless disregard of its truth or falsity (A27). App. X132-33.

The District Court observed that petitioner did not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that the two engi-

neers of respondent who made up the "panel" alleged to have made the actual observations, must have known that the statement was false (A29). App. X140. In rejecting the profession of Seligson's good faith belief in the accuracy of the Article as written, the District Court said, "Because Seligson wrote the words upon which the false statement in the Article was based, it is his state of mind that is critical[44]." (A29) App. X140-41.

The District Court concluded, "After careful consideration of Seligson's testimony and of his demeanor at trial, the

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[44] The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room." App. X168.

Court finds that Seligson's testimony on this point is not credible." (A29) App. X142.

The District Court had previously ruled:

> The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded. (A20 n.33) App. X163 n.33.

The District Court ruled:

> ... the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. (A30) App. X143.

In reviewing and reversing the judgment of the District Court judges, the Court of Appeals held the statement to be disparaging and assumed that it was a false statement of fact. App. X19-21. After noting that petitioner did not dispute that it is a "public figure" with respect to the subject matter of the Article, App. X21, the Court of Appeals said:

> We focus, therefore, on the District Court's holding that Bose proved by clear and convincing evidence that CU published the words "individual instruments [heard through the *Bose* system] ... tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its

> burden of proof. ... At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact. App.X22-23.

Respondent had argued that the Court of Appeals "is not limited by the 'clearly erroneous' standard ... ." Brief for Appellant p.18.

The Court of Appeals observed:

> The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. ... A court typically will infer actual malice from objective facts. ... These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case. App. X27-28.

After stating, "CU's editorial procedures reveal no evidence of actual malice," App. X32, the Court of Appeals summarized the editorial procedures. This summary was based on the testimony of re-

spondent's Technical Director Monte Florman whose testimony had been found to be "wholly untrustworthy and ... not credible" by the District Court (A20 n.33). App. X163 n.33. Compare App. X32-34 with A201-02 and A220-22.

The Court of Appeals said:

> Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the Article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the Article--perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice. App. X34-35.

There had been no evidence that respondent's engineer wrote the false and disparaging statement in "an attempt to produce a readable article for its mass audience." The Dis-

trict Court said that the Article contained respondent's evaluation on the quality and performance of the loudspeakers based on respondent's tests of them (A5). App. X46.

The Court of Appeals observed that

> the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests--would support the position that the statements are factual. App. X18.

The Court of Appeals did not mention the rulings of the District Court on the credibility of respondent's witnesses Seligson (A29-30), App. X142, or Florman (A20 n.33), App. X163 n.33, under the heading "Our Review." App. X15-36. Under the heading "The Findings of the District Court," App. X8, it did state that the District Court "found that Seligson's testimony as to what the words 'about the room meant' was not credible." App. X14.

On November 14, 1982, petitioner filed a petition for rehearing, suggesting that it be *en banc*. Petitioner there urged that the standard of review discarding the "clearly erroneous" test under FED. R. CIV. P. 52(a) was directly in conflict with the recent decision of this Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L.Ed.2d 606 (1982). The petition for rehearing also urged that the Court of Appeals erroneously considered the state of mind of members of respondent's editorial staff instead of the state of mind of the author of the false statement, to reach a result contrary to that required by the controlling decision of this Court in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). The petition for rehearing also urged that the Court of Appeals based its conclusions upon testimony found by the trial judge to be not credible. Petition

pp.10-12.

The petition urged that the appellate court's task is to determine if there is "sufficient evidence to permit the conclusion", and not to draw its own conclusions from the evidence, citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 56 (1971). Although the Court of Appeals cited *Rosenbloom* in support of the conclusion that "we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a)," App. X22, it made reference to page 54 of that opinion instead of page 56, which quoted from page 731 of *St. Amant*.

In denying the petition for rehearing suggesting a rehearing *en banc*, the Court of Appeals said:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and

the editorial staff which reviewed and modified Seligson's report.

As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion [not limited to the clearly erroneous standard of FED. R. CIV. P. 52(a)] is correct and was properly applied. Order of November 23, 1982.

Although both *Inwood Laboratories* and *Cantrell* were cited to the Court of Appeals in both petitioner's original brief at pp.13, 36, and its petition for rehearing at pp.2, 3, 7, 8, 9, 11, 12, 13, neither of these decisions of this Court was mentioned by the Court of Appeals in its opinion or in its order denying the petition for rehearing.

Reasons for Granting the Writ

1. It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility

of the witnesses." FED. R. CIV. P. 52(a). *E.g. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L.Ed.2d 606 (1982); *Pullman-Standard v. Swint*, ___ U.S. ___, 72 L.Ed.2d 66 (1982). In *Pullman-Standard* the Court said:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. 72 L.Ed.2d at 78-79.

In *Inwood* the Court further explained:

> That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. ... Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," ... it must accept the trial court's findings. (footnote omitted) 72 L.Ed.2d at 616.

In contrast, in the present case the Court of Appeals said:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead,

> we must perform a de novo review, independently examining the record to insure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof. App. X22-23.

Thus, the decision of the Court of Appeals is directly in conflict with these and other decisions of the Court, and with the "clearly erroneous" provisions which have been embodied in Rule 52(a) since the rules were adopted in 1938 to be in accord with the decisions on the scope of review in modern federal equity practice. See Notes of Advisory Committee on Rules following Rule 52.

The decision of the Court of Appeals in this case also is in conflict with a decision of the Court of Appeals for the Ninth Circuit in a case decided on November 18, 1982, *Cher v. Forum International, Ltd.*, 692 F.2d 634 (9th Cir. 1982). In *Cher* a defendant publisher had published

false statements relating to the plaintiff in advertisements, and claimed the protection of the First Amendment "in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth", 692 F.2d at 637. The trial court had found that the defendant "published the ads in question with knowledge that they were false or in reckless disregard for their truth." 692 F.2d at 639. The Court of Appeals held that there was sufficient evidence to support that finding, expressly applying the standards of FED. R. CIV. P. 52.

> Whether we agree with the trier's finding of knowing falsity, or fall back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd. 692 F.2d at 640.

There are many other lower court decisions following the "clearly erroneous"

standard for reviewing trial court findings when constitutional or civil rights are asserted. *E.g., Grausam v. Murphey*, 448 F.2d 197, 201 (3d Cir. 1971), *cert. dismissed*, 405 U.S. 981 (1972) and cases collected in Rules 34-54 U.S.C.S. Rules of Civ. P., Rule 52 n.96 (Law. Co-op 1974 and Cum. Supp. 1982).

While the Court of Appeals in the present case cited authorities after the "See" signal, including decisions of this Court, decisions of courts of appeals, and articles, App. X22-23, the decisions cited did not rule, nor did they imply, that a court of appeals is free to ignore the Rule 52(a) "clearly erroneous" standard of review. The departure by the Court of Appeals from the Rule 52(a) "clearly erroneous" standard of review represents such a marked departure from the accepted and usual course of appellate review of trial

court findings as to call for an exercise of this Court's power of supervision.

The Court of Appeals justified its departure from the "clearly erroneous" standard of review prescribed by FED. R. CIV. P. 52(a) as being necessary "to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." App. X22-23.

This ruling by the Court of Appeals is directly in conflict with *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) and 443 U.S. 526, 534 n.8 (1979), cited in *Pullman-Standard*, 72 L.Ed.2d at 79, and with *Mayor v. Educational Equality League*, 415 U.S. 605,621 n.20 (1974). There this court held that the "clearly erroneous" rule applies even when constitutional rights are asserted under the equal protection clause of the Fourteenth Amendment.

Rule 52(a) applies to this Court "just as fully on direct appeal to the court as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974). The departure from Rule 52(a) announced by the Court of Appeals is a decision on an important question of federal law having an impact on the appellate review of trial court findings in all cases where federal constitutional rights are asserted, and is squarely in conflict with applicable decisions of this Court. If the right of a plaintiff to obtain pretrial discovery of the author's state of mind for the purpose of proving actual malice is sufficiently important to justify review in this Court, *Herbert v. Lando*, 441 U.S. 153, 158 (1979), a fortiori the right of a plaintiff to have an appellate court accept a trial court's finding on the author's state of mind proving ac-

tual malice is sufficiently important to require review of this case in this Court.

2. In *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) the defendant had published an article containing false statements written by a reporter employee. The Court of Appeals reversed a judgment for the plaintiff on the ground that "there is no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities or in reckless disregard of whether or not it was true." 484 F.2d 150, 157 (6th Cir. 1973). This Court reversed the judgment of the Court of Appeals and remanded the case with directions to enter a judgment affirming the District Court judgment against both the reporter Eszterhas and the publisher. The Court said that

> there was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment at the Plain Dealer and that Forest City Publishing Co. was there-

fore liable under traditional doctrines of *respondeat superior*. 419 U.S. at 253.

In the present case the Court of Appeals examined in detail the sufficiency of the evidence to show that members of the editorial staff of respondent did not know the statement was false, App. X32-34, although the trial court found that the author of the statement knew that it was false, App. X142-43, and there was ample evidence to support that finding (A29-30). App. X139-43. This evidence was reviewed in detail in petitioner's brief below at pages 21-28, but the Court of Appeals did not mention it. Finding that the author's testimony to the contrary was not credible, the District Court found that at the time of the Article's publication the author knew that the false statement did not accurately describe the effects that he and the other of respondent's engineers had heard during the "special listening test."

(A29-30) App. X142-43.

Consistent with *Cantrell*, the District Court ruled, "Because Seligson wrote the words upon which the false statement was based, it is his state of mind that is critical[44]." (A29) App. X140-41. "The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that 'tended to wander about the room.'" (A29 n.44) App. X168 n.44.

The decision of the Court of Appeals in failing to accept these findings of the trial court, which were based on sufficient evidence, while focusing on the care exercised by the editorial staff of respondent in reviewing the false statement, is directly in conflict with *Cantrell*. *Cantrell* held that the author's knowledge of falsity, where the author was an employee of respondent, must be imputed to respondent as a

matter of law for purposes of applying the "actual malice" test. Here author Seligson was an employee of respondent and was found by clear and convincing evidence to have had knowledge that the false and disparaging statement was false when respondent published it.

3. Although the Court of Appeals said that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact," App. X23, the Court of Appeals failed to even mention the rulings of the trial court on the author's credibility in its review of the findings. App. X15-36. The trial court said, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible." (A29) App. X142.

The District Court concluded:

Based on the above finding that

> Seligson's testimony to the contrary is not credible, the Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments ... tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." (A30) App. X142-43.

By failing to accept this finding on the credibility of the author or the findings on the credibility of respondent's technical director (A20 n.33), App. X163 n.33, as witnesses and instead relying on the testimony of the latter, the Court of Appeals made such a departure from the accepted and usual course of judicial proceedings in which appellate courts accept the trial court's evaluation of the credibility of witnesses as to call for an exercise of this Court's power of supervision.

4. This departure by the Court of Appeals, in failing to accept findings on credibility of witnesses by the trial court, deprived petitioner of its compen-

satory damages in violation of the Fifth Amendment. Due process requires that a party to a trial without jury be entitled to have questions of credibility of witnesses resolved by the Article III trial judge who actually heard the witnesses testify and observed their demeanor. When the Court of Appeals did not accept the trial court findings on credibility of witnesses, it deprived petitioner of a property right without due process of law.

This point was not urged below because it arose only when the Court of Appeals ruled. The question is one that has not been, but ought to be, decided by the Court and vitally affects appellate rulings in all cases where a trial court rules on the cridibility and demeanor of witnesses.

5. The questions presented are of great importance in lending guidance to both publishers and persons damaged by the

publication of false statements in assessing their rights and liabilities. Whether a trial court finding based on proof by clear and convincing evidence from the mouth of an author who knowingly falsely disparaged a product can be overturned on appeal by disregarding the trial court's judgment on the credibility of the author as a witness vitally affects the degree of supervision a publication must exercise over its employees to avoid publishing a lie and the motivation of a publisher to retract a lie that has been published.

Whether *New York Times* is to be extended by authorizing a relaxed standard of appellate review of trial court findings to allow a magazine, which has ample time to check the accuracy of disparaging statements it proposes to publish, that publishes a false and disparaging statement known by its employee-author to be false,

to escape responsibility for the damage caused by that statement, is a question that has not been, but ought to be, decided by this Court. We submit that no responsible journalist claims a right under the First Amendment to lie. The instant case is therefore vitally important in delimiting the extent of constitutional rights to lie afforded by the First Amendment.

The importance of this case to many persons other than the parties involved is evidenced by the Court of Appeals receiving amicus curiae briefs on behalf of the Massachusetts Civil Liberties Union, Dow Jones & Company, Inc., The Dun & Bradstreet Corporation and the Magazine Publishers Association. Dow Jones publishes, *inter alia*, *The Wall Street Journal*, the nation's largest circulation daily newspaper, and *Barron's National Business and Financial Weekly*. It gathers and publishes business,

product, corporate and consumer information of public interest, some of which is critical of persons and products. Dun and Bradstreet publishes Dun's *Business Month* and about 30 other specialized business, technical and consumer magazines. Many of its publications evaluate, rate or review products, services or financial conditions. Brief of Dow Jones et al. as Amici Curiae in Support of Defendant-Appellant Urging Reversal of the Judgment Below at 5.

The Magazine Publishers Association (MPA), founded in 1919, represents 188 publishers of 800 different publications on numerous subjects including business, corporate, product and consumer information. The American people subscribe to about 250,000,000 copies of each issue of MPA member magazines. *Ibid.*

6. The Court of Appeals erroneously relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in support of its ruling that it was not limited to the "clearly

erroneous" standard of Rule 52(a) in reviewing trial court findings, citing 376 U.S. at 285 and n.26 and *Time, Inc. v. Pate*, 401 U.S. 279, 284 (1971). App. X23.

The rationale for justifying a more stringent standard of proof for "hot news" publications like *The New York Times* and TIME may be justified on the limited ability of a daily newspaper or weekly newsmagazine under the pressure of deadlines to verify the accuracy of published statements. Whether these cases and their progeny should be extended to allow a magazine, which has months in which to verify, to escape liability by relaxing the "clearly erroneous" rule for appellate review on knowledge of falsity is a question of vital importance to publishers and to those damaged by the publication of knowingly false statements. None of these cases purported to usurp for appellate courts the right to

ignore rulings by trial courts on the demeanor and credibility of witnesses. We submit that the better policy is for appellate courts, whose judges did not observe the witnesses testifying, to follow the findings of the trial court judge, who observed the witnesses testifying, on credibility and demeanor. "The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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